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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ENDURANCE AMERICAN
SPECIALTY INSURANCE COMPANY,

Plaintiff,

vs.

HAMILTON BREWART INSURANCE
AGENCY, LLC, et al.,

Defendants..

AND RELATED COUNTERCLAIM

Case No. 12-cv-9277 JFW (Ex)

**DEFENDANT HBIA'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION
TO MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, FOR SUMMARY
ADJUDICATION**

Date: April 22, 2013
Time: 1:30pm
Judge: Hon. John F. Walter

Defendant Hamilton Brewart Insurance Agency, LLC ("HBIA"), for itself and itself alone,¹ hereby opposes the Motion for Summary Judgment Or, In The Alternative, For Summary Adjudication, filed by Plaintiff Endurance American Specialty Insurance Company ("Endurance"), as more fully set forth herein.

¹ Defendant Derek Brewart is separately represented. The Hamilton Brewart Trust is currently in default (Docket #26). Within the past few days the powers of the receiver were expanded to include the Hamilton Brewart Trust (AUF No. 96). The receiver is currently contemplating, with the advice of counsel, how to proceed in regard to that entity. However, given the default, no response will be provided to this Motion.

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1 I. INTRODUCTION

2 Defendant HBIA was, for many years, a major insurance agency/broker in
3 the Inland Empire. Since October 2012, HBIA has been under the management of
4 a court-appointed receiver, Ted Lanes, who is responsible for winding-up the
5 operations of HBIA for the benefit of the creditors of HBIA. While it was creditor
6 Universal Bank which requested the appointment of a receiver, the Order
7 appointing the receiver (consistent with California law) makes it clear that the
8 receiver answers to the Los Angeles Superior Court, not to Universal Bank. (*See*
9 AUF² No. 92.)

10 Counsel in this matter was selected and appointed by the receiver. Counsel
11 is, therefore, cognizant of the various preliminary reports³ filed with the Los
12 Angeles Superior Court. As such, HBIA recognizes that, at trial, a finder of fact,
13 weighing the circumstantial evidence and the disputed facts, might reach some
14 conclusions adverse to HBIA.

15 However, notwithstanding what might or might not happen at a trial, HBIA
16 contends that the admissible evidence offered by plaintiff Endurance (of which
17 there is relatively little after removing hearsay, improper judicial notice and un-
18 authenticated documents) at this time, in combination with the significant legal
19 deficiencies discussed in this Opposition, means that the MSJ⁴ is wholly deficient
20 and must be denied.

21 Moreover, there are two significant procedural deficiencies pursuant to which
22 this Court should deny the motion, as discussed in the next two sections.

24 ² The abbreviation “AUF” will be used to refer to those “Additional
25 Undisputed Facts” appearing in the “Separate Statement of Undisputed Facts and
26 Conclusions of Law.”

26 ³ As discussed in the Evidentiary Objections, these reports are not under
penalty of perjury and they refer to an ongoing investigation

27 ⁴ The abbreviation “MSJ” (“Motion for Summary Judgment”) will be used to
refer to the pending Motion. HBIA recognizes that the MSJ also includes a request
28 for Summary Adjudication and will distinguish that technicality where it is
essential to the meaning of the argument.

II. THE MOTION WAS FILED AND SERVED UNTIMELY

The MSJ in this matter was e-filed and e-served by Endurance after 11:00 p.m. on Monday, March 25, 2013, more than seven hours past the deadline. As discussed below, pursuant to the Local Rules for this District that means that the filing was deemed filed and served one day too late for the selected hearing date.

And this was a matter of material prejudice to HBIA because if the hearing date had been set correctly HBIA would have been entitled to an additional week to prepare its Opposition.⁵

Indeed, the Ninth Circuit has advised the District Courts within the Central District of California (as distinguished from every other court in the Circuit) to be particularly heedful of motion deadlines and solicitous of requests for continuance because of its observation, in *Ahanchian v. Xenon Pictures, Inc.* (9th Cir. 2010) 624 F.3d 1253, 1258 that:

To begin with, [the party opposing the MSJ] faced an exceptionally constrained deadline resulting from the peculiar dictates of the local rules for the Central District of California. [emphasis added]

The Ninth Circuit then explained, in footnote 6 of *Ahanchian*, what it meant by the “peculiar dictate” of the local rules in this District:

As a result, where a movant chose to file a motion . . . [on] the last day allowed by local rules – the nonmovant has a mere seven days to file an opposition. This abbreviated timeline is unusual; every other district in this circuit guarantees nonmovants at least fourteen days to file an opposition to a motion.

⁵ HBIA did not delay in presenting this issue to the Court. HBIA filed an *Ex Parte* Application (Docket #82) with this Court requesting a continuance of the hearing on the MSJ (which would have extended the time for Opposition under Local Rule 7-11) on several grounds including, but not limited to, the defect in notice and the size of the filing. That *Ex Parte* Application was denied (Docket #85). Notably, Endurance has not filed a Motion under Rule 6(b) seeking relief for the late filing (which relief, HBIA would argue, must be denied).

1 In this matter, Endurance made a voluntary strategic decision to file the MSJ
 2 for a hearing date of April 22, 2013. In that regard, this Court allows counsel to
 3 unilaterally select the hearing date, unless it is a closed date. And the next “closed”
 4 motion date for this Court is not until May 27, 2013. Nor is there any deadline in
 5 the case which would obligate Endurance to file for an early hearing date since the
 6 deadline for hearing of dispositive motions isn’t until June 17, 2013. (Docket #44)

7 Pursuant to Local Rules 6 and 7, at least in the Central District, the applicable
 8 deadlines⁶ for motion related filings are all based on the hearing date selected. The
 9 entire process begins with L.R. 6-1 which specifies in relevant part:

10 The notice of motion shall be filed with the Clerk not later than
 11 twenty-eight (28) days before the date set for hearing, and shall be
 12 served on each of the parties electronically . . . If served personally, or
 13 electronically, the notice of motion shall be served not later than
 14 twenty-eight (28) days before the Motion Day designated in the notice.

15 That is, if a party wanted to have a motion heard on April 22, the Local Rules
 16 establish a deadline of March 25 for filing and service. The wording of this
 17 deadline is not materially different from the wording of the deadline for filing of the
 18 Opposition and the Reply. See, for example, L.R. 7-9 which provides that:

19 Each opposing party shall . . . not later than twenty-one (21) days
 20 before the date designated for the hearing of the motion . . . serve upon
 21 all other parties and file with the clerk . . .

22 HBIA’s reference to these dates as “deadlines,” including the date for filing the
 23 motion, is fully accurate. The Ninth Circuit said in *Ahanchian, supra* at footnote 6,

24 _____
 25 ⁶ Endurance, in its Opposition (Docket #84) to HBIA’s Ex Parte request to
 26 continue the hearing on the MSJ, argued that the term “date due” in this Court’s
 27 Order (Docket #10) does not apply to the filing of the motion itself, because that
 28 isn’t a “date due.” Of course, since the term “date due” doesn’t exist anywhere in
 the Local Rules it could be argued that this Court’s Order doesn’t apply to any
 filing. But HBIA submits that the interpretation offered by Endurance makes no
 sense and that the intention of the Court, to wit, that the term “date due” should
 apply to all deadlines, can be readily discerned, as more fully set forth herein.

1 that “the Central District Local Rules establish deadlines for filing motions and
 2 oppositions by counting backwards from an established hearing date.” [emphasis
 3 added]

4 Having established that March 25, 2013 was the “deadline” for filing and
 5 service of the MSJ, the question is whether this Court’s Order (Docket #10) applies.
 6 Section 3(b) states:

7 All documents that are required to be filed in an electronic format
 8 pursuant to the General Order Authorizing Electronic Filing shall be
 9 filed electronically no later than 4:00 p.m. on the date due unless
 10 otherwise ordered by the Court. Any documents filed electronically
 11 after 4:00 p.m. on the date due will be considered late and may be
 12 stricken by the Court. . . [emphasis added]

13 There is no genuine dispute about the applicability of electronic filing to this case
 14 (LR 5-4.1). And the Local Rules, which are the source of the deadline (28 days
 15 before the selected hearing date) are also the source of the time when such motion
 16 must be filed and served. LR 5-4.6.1 provides that:

17 Unless otherwise provided by order of the assigned judge, all
 18 electronic transmissions of documents must be completed prior to
 19 midnight . . . in order to be considered timely filed on that day.
 20 [emphasis added]

21 Here, the assigned judge (this Court) has otherwise provided, and has stated that the
 22 deadline is 4:00pm, not more than seven hours⁷ later.

23 HBIA would suggest that the correct remedy is for the court to deny this
 24 motion, without prejudice to Endurance’s right to file a motion in a manner
 25 consistent with all the applicable legal requirements, including the Local Rules.

26 ⁷ It might be argued by Endurance that most people don’t do work after
 27 4:00 p.m. so that the violation of this Court’s Order is harmless. First,
 28 unfortunately that is an untrue assumption for both judges and attorneys. Second, if
 that argument were to be accepted, it could be asserted that any filing before
 8:00 a.m. the day after the date due is sufficient.

1 **III. THE COURT SHOULD NOT ENTERTAIN THIS MOTION UNDER**
 2 **THE UNIQUE CALIFORNIA LAW DOCTRINE SET FORTH IN**
 3 **HASKEL/MONTROSE**

4 California law, which is controlling in this matter, recognizes a unique
 5 doctrine, applicable to disputes between insurance companies (such as plaintiff
 6 Endurance) and their insureds (such as defendant HBIA).

7 Pursuant to that doctrine a court should not entertain a motion which seeks
 8 judicial determinations, specifically such as summary judgment or summary
 9 adjudication of issues, which could harm the interests of the insured in relation to
 10 the underlying claims.

11 HBIA assumes that Endurance may attempt to seize upon the words “stay”
 12 and “declaratory judgment.” However, as shown below, neither of those terms is
 13 applied in the literal sense by the California appellate courts, whose decisions are
 14 controlling here.

15 **A. THIS DIVERSITY CASE, RELATING TO INSURANCE**
 16 **COVERAGE, IS GOVERNED BY CALIFORNIA LAW**

17 Subject matter jurisdiction in this case is based solely upon diversity
 18 jurisdiction. (Request for Judicial Notice, Ex. 35 (First Amended Complaint).

19 Accordingly, in this matter, California law must be applied to the state law
 20 claims. See, for example, *Catlin Underwriting v. San Diego Refrigerated Services*
 21 (9th Cir. 2012) 469 Fed.Appx. 529, 530 where the court stated:

22 California law governs this insurance policy dispute brought in a
 23 diversity action. *Hyundai Motor America v. National Union Fire Ins.*
 24 *Co.* (9th Cir. 2010) 600 F.3d 1063, 1066.

25 and *Davis v. HSBC Bank Nevada* (9th Cir. 2012) 691 F.3d. 1152, 1159 where the
 26 court stated:

27 As we sit in diversity, California law governs our analysis of the state
 28 law claims. See, e.g., *Cahill v. Liberty Mut. Ins.Co.* (9th Cir. 1996) 80
 F.3d 336, 338.

1 While only the Federal appellate courts can reverse a decision of this Court,
 2 in a diversity matter, where the relevant state courts have spoken unambiguously,
 3 those authorities are generally controlling. For example, the U.S. Supreme Court
 4 has noted that if "an intermediate appellate state court rests its considered judgment
 5 upon the rule of law which it announces, that is a datum for ascertaining state law
 6 which is not to be disregarded by a federal court unless it is convinced by other
 7 persuasive data that the highest court of the state would decide otherwise." *West v.*
 8 *AT&T Co.* (1940) 311 U.S. 223, 237, 61 S.Ct. 179, 85 L.Ed. 139 .

9 **B. ALTHOUGH SOME TRIAL LEVEL COURTS HAVE ERRED,**
 10 **NO CALIFORNIA APPELLATE COURT HAS FAILED TO**
 11 **APPLY THE HASKEL/MONTROSE DOCTRINE WHERE THE**
 12 **ISSUES IN THE COVERAGE CASE OVERLAP WITH THOSE**
 13 **IN THE UNDERLYING CLAIM**

14 California law has a doctrine which protects insureds, even those insureds
 15 who might not otherwise be entitled to coverage, from being judicially attacked by
 16 their own insurer concurrently with the underlying claims which the insurer is
 17 seeking not to cover.

18 HBIA would contend that the seminal decisions are *Montrose Chemical*
 19 *Corp. v. Superior Court (Montrose II)* (1994) 25 Cal.App.4th 902, 910 and *Haskel,*
 20 *Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, 979.

21 The right to a stay, as set forth in *Haskel* and *Montrose*, is predicated on three
 22 separate policy considerations (the "*Haskel* and *Montrose* doctrine") that must be
 23 examined: (1) "the insurer, which is supposed to be on the side of its insured and
 24 with which it has a special relationship, would be permitted to effectively attack its
 25 insured, indirectly providing assistance to the underlying claimant"; (2) "allowing
 26 such a declaratory relief action to proceed would require the insured to expend
 27 resources to fight a two-front war, one with the underlying claimant and one with
 28 its insurer, thus undercutting a primary reason for purchasing liability insurance in
 the first instance"; and (3) "if the declaratory relief action proceeded to trial before
 the underlying action, the insured might be collaterally estopped to contest issues

1 relating to its liability in the underlying action.” *Advanced Marketing Services v.*
 2 *Superior Court* (“AMS”)⁸ No. D046866, 2005 WL 3491023 citing *Haskel, Inc. v.*
 3 *Superior Court* (1995) 33 Cal. App. 4th 963, 979 and *Montrose Chemical Corp. v.*
 4 *Superior Court (Montrose II)* (1994) 25 Cal.App.4th 902, 910.

5 Efforts by California trial courts to avoid the Haskel/Montrose doctrine have
 6 been held to be an abuse of discretion. In *United Enterprises, Inc. v. Superior*
 7 *Court* (4th Dist, Div. One, 2010) 183 Cal.App.4th 1004 the California Court of
 8 Appeal was faced with a Writ of Mandate after the trial court attempted to craft an
 9 “alternative” to a stay in an insurance coverage matter. The Court said at 1012:

10 In this case, the court misread *Montrose I* and denied United's
 11 request for a stay of the declaratory relief action, even though it found
 12 that Royal's motion was "putting the insured in a position where they
 13 will have to try to prove some of the things they are actually trying to
 14 defend themselves from." We agree with United that the factual issues
 15 raised by facts numbered 16, 17, 18 and 19 of Royal's separate
 16 statement of undisputed facts overlap the cited allegations of the
 17 underlying actions. We therefore conclude that the court erred in
 18 denying United's request for a stay, and that the error constitutes an
 19 abuse of discretion justifying relief.

20 An even more helpful explanation of the correct application of California law
 21 can be found in *AMS, supra*. In that matter the insured sued the insurer for bad
 22 faith and the insurer's counter-claims included a claim for rescission. Further, the
 23

24 ⁸ AMS is an unpublished decision of the California Court of Appeal.
 25 However, the Ninth Circuit has recently stated, *en banc*, that citation to unpublished
 26 California decisions is proper in these circumstances. See *Beeman v. Anthem*
 27 *Prescription Management, LLC* (9th Cir. 2012) 689 F.3d 1002 (as amended 7-10-
 28 12) where the court, sitting *en banc*, said in footnote 2, “[a]lthough they are not
 precedent under California Rule of Court 977(a), **we may nonetheless rely on the
 unpublished opinions in A.A.M. and Bradley to ‘lend support’ to the contention
 that ARP Pharmacy ‘accurately represents California law.’** *Emp'rs Ins. of
 Wausau v. Granite State Ins. Co.* (9th Cir. 2003) 330 F.3d 1214, 1220 n. 8.”

1 insured did not file a motion to stay the case. The insurer's efforts to argue that the
2 circumstances were different were unavailing.

3 As demonstrated by *Haskel* and *AMS*, neither of which involved a motion
4 seeking a stay of the entire action, the principles underlying the doctrine do not
5 require the technicality of filing a motion to stay the case⁹ before asking the court to
6 defer otherwise inappropriate action. Nor is there any support in the California
7 Court of Appeal decisions for Endurance's suggestion that a decision to wait and
8 bring a motion for stay later in the case can cause the loss of that substantive right.

9 **IV. THE LEGAL STANDARDS APPLICABLE TO RULE 56 MOTIONS**

10 The Court's Order (Docket #44) indicates that counsel should accept that the
11 court is familiar with the principles of Rule 56 and the *Celotex* doctrine. HBIA
12 hereby accepts the court's invitation to avoid restatement of such principles, subject
13 to the understanding that HBIA does not waive the right to make any proper
14 argument, here or on appeal.

15 HBIA does note that, under FRCP Rule 56(c), it is Endurance, as the moving
16 party, which has the burden of coming forward with competent evidence to support
17 its proposed "Undisputed Facts" ("UF"). See, for example, *In Re Ahaza Systems*
18 (9th Cir. 2007) 482 F.3d. 1118, where the court said, at footnote 1:

19 Stratos has not, however, presented evidence supporting this
20 allegation, and Wood has not so admitted or alleged. We therefore do
21 not accept it as an undisputed fact on summary judgment. See
22 *generally Barcamerica Int'l USA Trust v. Tyfield Importers, Inc.* (9th
23 Cir. 2002) 289 F.3d 589, 593 n. 4 ("[A]rguments and statements of
24 counsel are not evidence and do not create issues of material fact
25 capable of defeating an otherwise valid motion for summary
26 judgment." (internal quotation omitted)) [emphasis added]

27 ⁹ HBIA has, concurrent with the filing of this Opposition, filed a Motion to
28 Stay with this Court. That motion is set for hearing just one week after this motion,
the first allowable date under Local Rule 7-3.

1 As more fully set forth in the Evidentiary Objections filed by HBIA, a
 2 substantial portion of the key “Undisputed Facts”, offered by Endurance, are not
 3 supported by any competent evidence and are, therefore, nothing more than
 4 arguments by counsel.

5 **V. ARGUMENTS OPPOSING THE SPECIFIC ITEMS PROPOSED IN**
 6 **THE MOTION FOR SUMMARY JUDGMENT OR SUMMARY**
 7 **ADJUDICATION**

8 Endurance makes eight separate requests for summary judgment or summary
 9 adjudication (Memorandum in Support, Section III, subsections A-H). In the
 10 interest of simplifying the process of tracking arguments both for counsel, and for
 11 the Court, HBIA will respond to each of the arguments raised by Endurance in the
 12 same order.

13 There is one predicate factual issue which runs through many of these
 14 arguments, which is the alleged “Premium Financing Fraud.”

15 First, HBIA contends that Endurance has not presented competent evidence
 16 of the existence of the Premium Financing Fraud, for all the reasons stated in the
 17 Evidentiary Objections. Most of the “evidence” offered consists of reports of the
 18 receiver filed with the Los Angeles Superior Court. But those documents are
 19 interim reports regarding an ongoing investigation, they are not under penalty of
 20 perjury, they are hearsay and the contents are not subject to judicial notice, among
 21 other objections. In other words, HBIA contends that they are not evidence for the
 22 purposes of this MSJ. HBIA respectfully submits that the Court should begin by
 23 ruling upon the Evidentiary Objections and determine whether there is any
 24 competent evidence supporting the existence and/or dates on which various acts
 25 were taken as party of the alleged “Premium Financing Fraud,” for the purposes of
 26 this MSJ.

27 Second, HBIA would note that the only party which is alleged to have been
 28 harmed by the alleged Premium Financing Fraud was Universal Bank, not any
customer of HBIA (and no evidence has been submitted by Endurance that any

claim has been made, on behalf of any customer of HBIA, related to the Universal Bank claim.) This is particularly relevant to HBIA's responses to the Claims Experience questions in the renewal applications which, as discussed below, focus on the customer aspects of the business, not on the financing of the business.

For the purposes of this Memorandum, from this point forward HBIA will simply refer to the "alleged Premium Financing Fraud" as a means of reminding the Court of its contention that such item does not actually have evidentiary support, at least for the purpose of this MSJ.

A. **ENDURANCE IS NOT ENTITLED TO OBTAIN RESCISSION OF THE 2012 POLICY**

Endurance argues that it is entitled to rescission of the 2012 policy based on the alleged failure of HBIA, in responding to the Application, to provide information about the alleged Premium Financing Fraud.

But the arguments by Endurance fail on several important grounds.

First, Endurance refers to five "Claims Experience" questions, but never says which of those questions, if any, was answered inaccurately. That is because, even assuming *arguendo* that the alleged "Premium Financing Fraud" did exist, none of the "Claims Experience" questions was answered incorrectly.

A review of the actual Claims Experience questions on the actual application shows that the questions asked about actual claims, suits or proceedings (Questions 13 and 14), about actual disciplinary actions (Question 15), about actual disputes over fees (Question 16) and about errors and omissions in work performed by the Applicant (Question 17).

Further, the questions which asked about claims and errors (13, 14 & 17) all ended with the following phrase, underlined and bold face in the original: "**which have not been previously reported to the Insurer.**" It was reasonable for anyone completing such an application to believe that when the application asked, for example, about "claims, suits or proceedings . . . during the past 12 months" it was

1 requesting such items only if they might be relevant to this Errors & Omissions
 2 policy. So if, for example, an insured had been sued for an automobile accident, it
 3 would not have been “previously reported to the Insurer” and it would not be the
 4 type of claim for which a response is required on the Application.

5 HBIA agrees with the legal proposition that questions, which appear on an
 6 Application, are presumed to be relevant and potentially material to the
 7 underwriting decision. But here, for strategic business reasons which are best
 8 known to Endurance, Endurance’s application:

- 9 - did not ask whether there were accounting problems at the proposed
 10 insured;
- 11 - did not ask whether the proposed insured was profitable or was
 12 experiencing financial problems;
- 13 - did not ask whether the insured had potential disputes with its banks or
 14 other financing sources.

15 There is a further problem with Endurance’s request. It is not enough to
 16 complain that an answer to a question is inaccurate – the insurer must also prove
 17 exactly what would have been different if it had obtained the correct information
 18 prior to issuance of the policy.

19 HBIA contends that Endurance has a failure of proof on this crucial element.

20 The critical issue in requesting rescission of an insurance policy is whether or
 21 not the misrepresentation upon which the rescission will be based is material or
 22 immaterial. The standard for determining materiality is contained in California
 23 *Insurance Code* section 334 which provides that:

24 Materiality is to be determined not by the event, but solely by
 25 the probable and reasonable influence of the facts upon the party to
 26 whom the communication is due, in forming his estimate of the
 27 disadvantages of the proposed contract, or in making his inquiries.
 28

1 This means that a determination of materiality is a *subjective test*. In *Coca*
 2 *Cola Bottling Co. v. Columbia Casualty Ins. Co.* (1992) 11 Cal.App.4th 1176,
 3 1889, the court stated at fn. 4 that:

4 The result we reach is entirely consistent with the holdings in
 5 *Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198
 6 Cal.App.3d 169, 180-181 [243 Cal.Rptr. 639] and *Old Line Life Ins.*
 7 *Co. v. Superior Court* (1991) 229 Cal.App.3d 1600, 1604-1605 [281
 8 Cal.Rptr. 15]. Those cases hold, and we agree, that the materiality of a
 9 misrepresentation in an insurance application is to be judged on a
 10 subjective basis from the perspective of the insurer and that false
 11 statements on an application will permit rescission of an insurance
 12 contract even if, later, the insured believes his false statement is
 13 unrelated to the particular risk which gave rise to his claim. (See Ins.
 14 Code, § 334.). [Emphasis added]

15 To rescind a policy of insurance, the request must be, “supported by the
 16 nature of the insurance coverage which defendants sought, the quality and quantity
 17 of the information which was not disclosed and . . . [the] specifically requested the
 18 information on [the insurer’s] application and thereafter relied upon in issuing the
 19 policy.” *Imperial & Cas. & Indem. Co. v. Sogomonian* (1988) 198 Cal.App.3d 169,
 20 182. This could include an insurer’s underwriting guidelines. *Nieto v. Blue Shield*
 21 (2010) 181 Cal.App.4th 60, 75. But Endurance has not provided any underwriting
 22 guidelines, their 30(b)(6) witness has testified that he doesn’t know about any
 23 guidelines, and the actual underwriters (Sokal and Amman) have not referred to any
 24 underwriting guidelines.

25 Unlike what Endurance contends here, “a simple incorrect answer on an
 26 insurance application will not give rise to a defense of fraud, where the true facts, if
 27 known, would not have made the contract less desirable to the insurer.” *Merced*
 28 *County Mt. Fire Ins. Co.* (1991) 233 Cal.App.3d 765, 773. In fact, in a case cited

1 by Plaintiff, *West Coast Life Ins. Co. v. Ward* (2005) 132 Cal.App.4th 181, 187,
 2 citing to *Old Line Life Ins. Co. v. Sup. Ct.* (1991) 229 Cal.App.3d 1600, 1603-1604,
 3 it was held in pertinent part that, “Other cases, however, inquire into the nature of
 4 the information withheld, and the likely practice of **the insurance company** had
 5 the concealed facts been truthfully disclosed . . .’ [Citations.]” [emphasis added]

6 Here, Endurance has not submitted any underwriting guidelines or provided
 7 any foundation to establish how the information provided supports a rescission.
 8 Endurance has provided only conclusory allegations from the two underwriters
 9 (Sokal and Amman)¹⁰ saying what they might have personally done, without any
 10 reference to company standards, precedent on other insureds, or any other non-
 11 conclusory information. The request by HBIA to obtain actual relevant
 12 information, pursuant to FRCP 56(f), should, at a minimum, result in a continuance
 13 of this motion until the time that the Court can be presented with relevant evidence.

14 Endurance, possibly recognizing that it lacks any direct evidence to support
 15 its claims, asserts that an adverse inference should be drawn with respect to Derek
 16 Brewart’s invocation of the Fifth Amendment at his deposition. However, this does
 17 not assist Plaintiff because:

18 The inference may not be drawn ‘unless this is a substantial need for
 19 the information and there is not another less burdensome way of
 20 obtaining that information.’ (citation omitted) . . . Moreover, the
 21 inference may be drawn only when there is independent evidence of
 22 the fact about which the party refuses to testify.

23 *Nationwide Life Ins. Co. v. Richards* (9th Cir. 2008) 541 F.3d 903, 912. In other
 24 words, the mere fact that a question is asked, and that a Fifth Amendment privilege
 25 is asserted, does not equal an affirmative answer to the question.

26 ¹⁰ Pursuant to FRCP 56(f), HBIA has requested that the Court continue this
 27 MSJ to allow HBIA to depose those two employees of Endurance, whose testimony
 28 varies materially from the 30(b)(6) testimony previously provided by Endurance.
 HBIA will also request the right to cross-examine these witnesses at the time of the
 hearing on this MSJ.

1 Endurance also refers to the “Tantod” action as though it is potentially
 2 significant (MSJ Exhibit 22). But, as reflected on the face of that Complaint, it
 3 relates to nothing more than an ordinary business loan from Golden Empire Capital
 4 Corp., purportedly secured by a life insurance policy on Hamilton Brewart (Exhibit
 5 22, page 549). It has no reference to the alleged Premium Financing Fraud. And
 6 there is NO question on the Application relating to this type of suit. It was never
 7 tendered to Endurance for coverage and it was dismissed shortly after it was filed.
 8 (AUF No. 91). And even Endurance’s own underwriter says that the only change
 9 she would have made, even if she had known about the Tantod action, was “I would
 10 have issued the Policy on different terms, which would have included an
 11 endorsement excluding the Undisclosed Tantod Action and other related claims
 12 from coverage.”¹¹ (Sokal Decl., ¶ 7). But, since the Tantod action was never
 13 reported to Endurance as a claim, and since it has been dismissed, there is no
 14 materiality to the issuance of the 2012 policy.

15 Finally, Endurance argues that there was a duty to “update” Endurance
 16 regarding the information provided in the Application. But this begs the same
 17 question. Which question in the Application does Endurance claim required an
 18 “update” from Derek Brewart? The non-evidence submitted by Endurance shows
 19 that there were ongoing discussions between Universal Bank and Derek Brewart
 20 about the possibility of repaying the money borrowed from Universal Bank by
 21 selling HBIA. While those alleged settlement efforts were not successful, that type
 22 of negotiations would be much more typical of a struggling borrower than of any
 23 fraudulent scheme.

24
 25 ¹¹ HBIA anticipates that, at her deposition, Ms. Sokal will testify that, as an
 26 underwriter, it is not her responsibility to determine whether a suit is covered under
 27 an Endurance policy. Therefore, she would have taken similar action if HBIA had
 28 disclosed a suit for an automobile accident, even though that type of claim is also
 not covered under the Endurance policy at issue here. In other words, the fact that
 she might have added an endorsement excluding coverage for a suit which was
 irrelevant to the policy does not constitute materiality.

B. THE APPLICATION EXCLUSION DOES NOT BAR COVERAGE UNDER THE 2012 POLICY

Endurance's argument regarding the "Application Exclusion" has many of the same defects as its argument about rescission.

Specifically, Endurance does not specifically identify what information, required by the Application, was not disclosed. In fact, between the lines in the rescission argument, Endurance implies that HBIA should have surmised that the alleged Premium Financing Fraud is something which Endurance would have wanted to know about, even though the Application didn't specifically request that type of information.

But the "Application Exclusion," by its own terms, is much more limited. The text of the "Application Exclusion," found at UF No. 66, limits that exclusion to "...required to be disclosed in response to Questions 13, 14, 15, 16 and/or 17..." So it is essential to show evidence that a specific question was not answered correctly, and to further demonstrate the materiality to Endurance (not just the personal opinion of an individual underwriter).

Endurance cites, as authority for the proposition that its Application is unambiguous, an unpublished Order issued by Judge Dale Fisher in *Endurance American Specialty Insurance Company v. AFA Financial Group*, 11-cv-1073 (Docket #248, 9/8/11). First, the Court there identified a specific question (#9) to which it felt an incorrect answer had been provided. Second, it was clearly a different application because question #9, in the HBIA application, isn't at issue in the Application Exclusion. Finally, there is some doubt about the efficacy of the precedent because, by Order dated February 20, 2013, the Ninth Circuit rejected the Motion for Summary Affirmance filed by Endurance American stating "because the arguments raised in the opening brief are sufficiently substantial to warrant further consideration by a merits panel." (AUF No. 94.)

Moreover, the Universal Bank lawsuit (which meets the definition of “claim” under the 2011 and 2012 Policy) was actually known to Endurance almost simultaneous with its filing, because it was submitted directly to Endurance by Universal Bank (UF No. 16). Endurance does not contend that HBIA knew about the Universal Bank suit before the time when Endurance had actual knowledge. Indeed, the facts submitted by Endurance would support the conclusion that Endurance learned about the suit even before HBIA.

As set forth in the FRCP Rule 56(f) declaration, filed concurrently, HBIA wishes to obtain discovery from the underwriters (Sokal and Amman) showing that HBIA’s responses to the Application were proper under the circumstances known at that time and showing that there were no standards at Endurance which would have resulted in any change in the issuance of the policies to HBIA.

C. THE UNIVERSAL BANK CLAIM IS NOT EXCLUDED BY THE “CLAIMS MADE” NATURE OF THE POLICY

Endurance’s argument fails for several reasons.

Most importantly, even assuming *arguendo* that Endurance had admissible and competent evidence to support UF Nos. 46-48 (which it does not), the alleged discussions do not meet the definition of a “claim” under the Endurance policy. UF No. 42 correctly indicates that the Policies define “Claim” to mean “a demand received by the Insured for money or services alleging a Wrongful Act. . .” And UF No. 43 correctly indicates that the Policies define “Wrongful Act” to be “any actual or alleged act, error or omission committed or attempted solely in the performance of or failure to perform Professional Services by an insured”

Endurance does not argue, and certainly does not admit, that in July, 2011 there was a “demand” from Universal Bank for money tied to a covered Wrongful Act. While there are allegations (not evidence) that certain conversations occurred between Derek Brewart and representatives of Universal Bank, HBIA would argue

1 that those were not specific enough to constitute a “claim” under the definition in
2 the policy.

3 Further, Endurance itself has taken contrary legal positions in this matter.
4 The Complaint in this matter sought rescission only of the 2012 Policy based on
5 Endurance’s contention that the claim was made and notice was given during the
6 2012 Policy. (AUF No. 95).

7 Endurance’s argument that *Root v. American Equity Specialty Ins. Co.* (Cal.
8 2005) 130 Cal.App.4th 926 has been narrowed and therefore does not weigh in
9 favor of denying its motion fails. As confirmed by the California Supreme Court
10 and subsequent district court decisions, *Root* stands for the general proposition that
11 “California law allows for equitable excusal of contractual conditions causing
12 forfeiture in certain circumstances, including circumstances making performance
13 futile.” *Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1186 (citing in part
14 *Root v. American Equity Specialty Ins. Co.* (2005) 130 Cal.App.4th 926, 939). In
15 *Doe v. Life Ins. Co. of N. Am.* (N.D. Cal. 2010) 737 F.Supp.2d 1033, 1043, the
16 district court recognized the import and breadth of *Root* and that “[l]ack of timely
17 notice is a defense to coverage only if the insurer can prove substantial prejudice
18 from the delay.” *Id.* at 1043 (citing *UNUM Life Ins. Co. v. Ward* (1999) 526 U.S.
19 358, 366, 119 S. Ct. 1380, 143 L. Ed. 2d 462). In addition, courts interpreting
20 *Root* have recognized that the insurer has the burden to show that it has been
21 prejudiced by the delay. *Id.*, citing *Root*, 130 Cal.App.4th at 947). Further,
22 “[p]rejudice is hard to show under the rule” and “[t]here is no presumption or
23 inference of prejudice based on evidence of delayed notice alone.” *Id.* Instead,
24 “[t]he insurer must show actual prejudice, not the mere possibility of prejudice.” *Id.*
25 (citing *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 761).

26 Endurance’s reliance on *World Health & Educ. Foundation v. Carolina Cas.*
27 *Ins. Co.* (N.D. Cal. 2009) 612 F.Supp. 1089 and unpublished decisions *Ill. Union*
28 *Ins. Co. v. Brookstreet Secs. Corp.*, No. SACV07-01095 CJC(RNBx) (C.D. Cal.

Nov. 20, 2009) 2009 U.S. Dist. LEXIS 130101, *23 and *Vision Quest Indus. v. Travelers* (C.D. Cal. Mar. 25, 2008) No. SACV07-512 JVS(ANx), 2008 U.S. Dist. LEXIS, *11-13 is misplaced. The district court in *Illinois Union* merely stated that a claim made far outside the Policy Period was not subject to the Equitable Excuse Rule, which is not the case here. In *World Health* and *Vision Quest*, unlike in the present case, the district courts simply found that the insured failed to present facts supporting application of the Equitable Excuse Rule.

Similarly, Endurance's reliance upon *Burns v. Int'l Ins. Co.* (9th Cir. 1991) 929 F.2d 1422, 1424 and *Westrec Marina Management, Inc. v. Arrowood Indemnity Co.* (2008) 163 Cal.App.4th 1387 are misplaced. *Burns* was decided 14 years before *Root* and therefore is distinguishable from the present case. In *Westrec*, unlike in the present case, the insurance company was not notified regarding the claim until 30 days after the expiration of the policy. Here, unlike in *Westrec*, Endurance was made aware of the claim before the policy expired when it received a letter from Universal Bank, and a second time, again during the policy period, in a letter from counsel for Derek Brewart.

D. ENDURANCE IS NOT ENTITLED TO RETROACTIVE JUDICIAL CONFIRMATION OF ITS DESIRE TO RESCIND THE 2011 POLICY

HBIA's argument here incorporates what has previously been stated in Section V.A. of this Memorandum, because the arguments regarding the right to rescind the 2012 policy is very similar to those regarding the right to rescind the 2011 policy, with a few exceptions.

First, Endurance does not argue that any "claim" had been made prior to the issuance of the 2011 policy.

Second, Endurance makes a material argument of counsel without any support in the evidence or even in the UF. At page 17, lines 23-25 Endurance argues that "Had Endurance known at the time that HBIA was generating additional revenue through the [alleged] Premium Financing Fraud, it never would have

1 agreed to issue the 2011 Policy.” But even the self-serving declarations of the
 2 Endurance underwriters (Amman and Sokal) make no reference to the effect which
 3 “generating additional revenue” might have had on the materiality of such
 4 hypothetical disclosures.

5 In fact, Endurance offers no evidence that the alleged Premium Financing
 6 Fraud was even generating “additional revenue.” Without waiver of HBIA’s
 7 objections to the “evidence,” the unauthenticated hearsay information which
 8 Endurance cites (Memo in Support, page 17, lines 22-23) actually says “we have
 9 never had any accurate balance sheet because all the loan money (liabilities) was
 10 not shown in our Balance Sheet . . .” How did counsel convert “loan money
 11 (liabilities)” into “additional revenue”? And where in the application does
 12 Endurance claim that it requested to know the amount of loans taken by a
 13 proposed insured?

14 **E. THE APPLICATION EXCLUSION DOES NOT APPLY TO**
 15 **THE 2011 POLICY**

16 For all the reasons stated in section V.B., above, the Application Exclusion
 17 does not serve to bar any coverage under the 2011 Policy.

18 **F. THE ASSISTANCE AND COOPERATION CLAUSES DO NOT**
 19 **BAR COVERAGE**

20 Endurance attempts to make an argument using “and/or” without focusing on
 21 the actual evidence, to the extent any exists.

22 Endurance argues that because Derek Brewart had meetings with one of his
 23 lenders, Universal Bank, and “admitted” that he had an obligation to repay the
 24 proceeds to loans, that this was somehow a violation of the policy conditions on
 25 cooperation. Such an interpretation of the requirements of an insurance clause
 26 would mean that no business could ever have a conversation with any lender, and
 27 particularly with any allegedly injured party, without being found in violation of the
 28 cooperation clause.

1 The policy attempts to say that the insurer won't be liable for settlements
 2 which are negotiated and consummated by insureds without allowing the insurer to
 3 participate. But the circumstances here, assuming *arguendo* that there is any actual
 4 evidence presented, do not include any allegation that HBIA actually consummated
 5 a settlement or admitted liability in a manner which has limited the ability of
 6 Endurance to defend the insured.

7 Indeed, as admitted by Endurance from the outset, Endurance has refused to
 8 defend and indemnify HBIA, claiming that it is excused from such obligation as a
 9 result of its "rescission" of the 2012 Policy. In fact, when presented with claims
 10 which are not related to the alleged Premium Financing Fraud, or to Universal
 11 Bank, or to any purported violation of the Assistance and Cooperation Clause,
 12 Endurance (through counsel) has refused to provide any coverage on the grounds
 13 that the policy has been rescinded, so that all other coverage obligations are
 14 excused. (AUF No. 90.)

15 Endurance argues that under *Low v. Golden Eagle* (2003) 110 Cal.App.4th
 16 1532 the court did not require a showing of prejudice. But the unique posture of
 17 that case, and its inapplicability here, was explained by the California Court of
 18 Appeal in *Belz v. Clarendon American Ins.* (2007) 158 Cal.App.4th 615 where the
 19 appellate court, citing its own previous opinion in *Truck Ins. Exchange v. Unigard*
 20 *Ins. Co.* (2000) 79 Cal.App.4th 966 said at 627-28:

21 "The Court of Appeal went on to explain that, unlike a notice
 22 provision or a cooperation clause, a no-voluntary-payment provision
 23 can be enforced without a showing of prejudice: "[T]he existence or
 24 absence of prejudice to [the insurer] is simply irrelevant to [its] duty to
 25 indemnify costs incurred *before* notice. The policy plainly provides
 26 that notice is a *condition precedent* to the insured's right to be
 27 indemnified; a fortiori the right to be indemnified cannot relate back to
 28 payments made or obligations incurred before notice.'" (*Truck Ins.*

1 *Exchange v. UnigardIns. Co., supra*, 79 Cal.App.4th at pp. 975-977,
 2 citations omitted; accord, *Insua v. Scottsdale Ins. Co.* (2002) 104
 3 Cal.App.4th 737, 746[129 Cal.Rptr.2d 138] [insurer must show
 4 prejudice where insured breaches notice provision or cooperation
 5 clause but not where insured makes voluntary payment]; *Faust v. The*
 6 *Travelers* (9th Cir. 1995) 55 F.3d 471, 472-73 [California courts
 7 consistently enforce no-voluntary-payment provision in absence of
 8 prejudice, but prejudice is necessary to enforce notice provision or
 9 cooperation clause]; see Croskey et al., Cal. Practice Guide: Insurance
 10 Litigation (The Rutter Group 2007) ¶¶ 7:407 to 7:417, pp. 7A-133 to
 11 7A-135 [notice provision]; *id.*, ¶¶ 7:419 to 7:425.15, pp. 7A-135 to
 12 7A-137 [cooperation clause]; *id.*, ¶¶ 7:439.5 to 7:439.10, pp. 7A-140
 13 to 7A-142 [no-voluntary-payment provision].)

14 Most cases applying a no-voluntary-payment provision have
 15 involved *pre-tender* payments by the insured. (See *Truck Ins.*
 16 *Exchange v. UnigardIns. Co., supra*, 79 Cal.App.4th at pp. 976-977.)
 17 In one case, however, the court dispensed with a showing of prejudice
 18 for *post tender* payments, reasoning that the prohibition on voluntary
 19 payments is based on an insurer's *lack of consent*, which can also occur
 20 *after* acceptance of tender and while the insurer is providing a defense.
 21 (See *Low v. GoldenEagle Ins. Co.* (2003) 110 Cal.App.4th 1532, 1544-
 22 1547 [2 Cal.Rptr.3d 761].)

23 Endurance does not claims (because it cannot) that HBIA made any voluntary
 24 payment to Universal Bank, the only aspect where prejudice is not required under
 25 controlling California law. Here, absent an allegation and proof of prejudice to
 26 Endurance, even if it were true that the insured had improperly had a conversation
 27 which could be construed as admitting liability, in the absence of an Undisputed
 28 Fact showing prejudice, Endurance cannot prevail. And Endurance has not

1 submitted any competent evidence demonstrating such prejudice, especially where
2 it has been the position of Endurance that it will not defend its insured, HBIA.

3 **G. THE UNIVERSAL BANK ACTION IS NOT BARRED BY THE**
4 **FORTUITY DOCTRINE OR BY INS. CODE 533**

5 The arguments presented in this section presuppose that Endurance is
6 discussing the scope of its duty to pay for the defense of HBIA in the Universal
7 Bank matter, an action where it has never agreed to fulfill that obligation. Further,
8 it attempts to ignore the actual means by which such a determination is made.

9 Endurance, apparently conceding that there is doubt about the applicability of
10 various policy exclusions, seeks to create a “fortuity doctrine” by pinning together
11 various authorities having nothing to do with insurance, along with cases that
12 discuss general principles of insurance, but without citing a case that actually
13 reaches the result they suggest on the type of evidence being presented to this court.

14 The California Supreme Court has stated, in *Montrose Chemical Corp v.*
15 *Superior Court* (1993) 6 Cal.4th 287, 295 that “the existence of a duty to defend
16 turns not upon the ultimate adjudication of coverage . . . but upon the facts known
17 by the insurer at the inception of a third party lawsuit.” [emphasis added] So the
18 issue is not what Endurance claims to know now, but what Endurance claims to
19 have known when it received the Universal Bank suit.

20 And the determination of coverage is expressly not based upon a summary of
21 the “heart” of the lawsuit. The Universal Bank suit includes claims for negligence.
22 The Court of Appeal summarized California law in *St. Paul Mercury Ins. Co. v.*
23 *Mountain West Farm Bureau* (2012) 210 Cal.App.4th 645, 655:

24 "It is settled that where an insurer has a duty to defend, the
25 obligation generally applies to *the entire action, even though the suit*
26 *involves both covered and uncovered claims, or a single claim only*
27 *partially covered by the policy.* [Citations.]' [Citation.]"
28 (*Transcontinental Ins. Co. v. Insurance Co. of the State of*

1 *Pennsylvania* (2007) 148 Cal.App.4th 1296, 1303[56 Cal.Rptr.3d 491],
 2 italics added; accord, *Croskey*, *supra*, ¶ 7:629, p. 7B-41 (rev. # 1,
 3 2010).) This is so even where only a single claim is potentially covered
 4 by the policy, and where noncovered claims predominate. (*Croskey*,
 5 *supra*, ¶¶ 7:629 to 7:630.1, p. 7B-41 (rev. # 1, 2010).) [emphasis
 6 added]

7 Also, it has been held, under California law, that even where Insurance Code
 8 section 533 might bar the obligation of an insurer to indemnify the insured, that
 9 does not mean that the insurer is not obligated to pay for the costs of defense, at
 10 least where the policy separates a duty to pay for defense from the duty to
 11 indemnify. (*Downey Venture v. LMI Ins. Co* (1998) 66 Cal.App.4th 478, 506-07).

12 Finally, HBIA would submit that Endurance has not made the necessary
 13 showing to prevail on this item even assuming that the alleged Premium Financing
 14 Fraud has been shown. The California courts have held that the term "willful act"
 15 under 533 has a specific meaning. In *Downey*, *supra*, at 500-501 the court said:

16 A "willful act" under section 533 will include either "an act
 17 deliberately done for the *express purpose* of causing damage or
 18 intentionally performed *with knowledge* that damage is highly
 19 probable or *substantially certain* to result." (*Shell Oil Co. v.*
 20 *Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 742 [15
 21 Cal.Rptr.2d 815], italics added.) It also appears that a wilful act
 22 includes an intentional and wrongful act in which ". . . the harm is
 23 inherent in the act itself." (*J. C. Penney Casualty Ins. Co., supra*, v. *M.*
 24 *K* (1991) 52 Cal.3d 1009, 1025.) In an earlier case, the Supreme Court
 25 had said that ". . . even an act which is 'intentional' or 'willful' within
 26 the meaning of traditional tort principles will not exonerate the insurer
 27 from liability . . . unless it is done with a 'preconceived design to
 28 inflict injury.'" (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d

1 865, 887 [151 Cal.Rptr. 285, 587 P.2d 1098].) However, the issue to
 2 which the *Clemmer* court spoke involved a question of the insured's
 3 mental capacity. Subsequent decisions have made clear that the
 4 "preconceived design to injure" standard is relevant only when the
 5 insured's "mental capacity is an issue or the insured's intent or motive
 6 might justify an otherwise wrongful act." (*Shell Oil Co. v. Winterthur*
 7 *Swiss Ins. Co.*, *supra*, 12 Cal.App.4th at p. 740; see also *J. C. Penney*
 8 *Casualty Ins. Co. v. M. K.*, *supra*, 52 Cal.3d at pp. 1021-1025.) Citing
 9 *J. C. Penney*, the *Shell Oil* court emphasized that "section
 10 533 precludes indemnification, whether or not the insured subjectively
 11 intended harm, if the insured seeks coverage for an intentional,
 12 wrongful act that is inherently and necessarily harmful." (*Shell Oil Co.*
 13 *v. Winterthur Swiss Ins. Co.*, *supra*, 12 Cal.App.4th at pp. 740-741,
 14 italics added.)

15 Above and beyond the evidentiary problems, Endurance has not offered any
 16 evidence that the alleged Premium Financing Fraud was done for the "express
 17 purpose" of harming Universal Bank (or any other party). In fact, the showing
 18 offered by Endurance would appear to contradict such a conclusion.

19 **H. RESTITUTION AND DISGORGEMENT**

20 HBIA would provisionally agree with Endurance's legal position that, to the
 21 extent that there is a final adjudication against HBIA holding that HBIA must pay
 22 funds which are properly characterized as restitution, and not damages, to Universal
 23 Bank, that portion of any judgment would likely not be covered under the Policies.

24 However, since those are not the only damages which Universal Bank has
 25 sought, or which it might seek, this is an inappropriate request for summary
 26 adjudication. Rather, at such time as there is an actual verdict in the matter, which
 27 can be examined and considered by the court, a determination can be made whether
 28 such judgment is, or is not, covered.

1 DATED: April 1, 2013

BUCHALTER NEMER
A Professional Corporation

By: /s/ - Steven Brower

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